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July 25, 1996

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Hand-Delivered

William F. Caton, Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Written Ex Parte Communications in IB Docket
No. 95-59

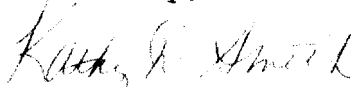
Dear Mr. Secretary:

On July 25, 1996, Lawrence R. Sidman on behalf of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc., submitted a written ex parte presentation, consisting of a letter dated July 24, 1996, with an attached memorandum to Jane Mago, Senior Legal Advisor to Commissioner Chong.

In accordance with Section 1.1206 of the Commission's Rules, an original and one copy of this letter and attachment are being filed with your office.

Any questions concerning this matter should be directed to the undersigned.

Sincerely,



Kathy D. Smith

Enclosure

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WRITER'S DIRECT DIAL
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July 25, 1996

Jane Mago, Esq.
Senior Legal Advisor
Office of the Hon. Rachelle Chong
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, D.C. 20554

Dear Jane:

Thank you for meeting with Merrill Spiegel, Ed Hummers, Gigi Sohn, Don Evans and me yesterday to discuss the Commission's implementation of Section 207 of the Telecommunications Act of 1996. During the course of that meeting, you requested elaboration on the issue on whether a viewer's First Amendment right to receive a variety of information from diverse sources as contemplated by Section 207 counterbalances or overrides any potential competing constitutional interest. The attached memorandum is intended to respond to your question.

Your consideration on this important issue is greatly appreciated.

Sincerely,

Lawrence R. Sidman

Lawrence R. Sidman

Attachment

MEMORANDUM

BOTH SECTION 207 AND SUPREME COURT PRECEDENT ESTABLISH THAT VIEWERS' FIRST AMENDMENT RIGHTS ARE OF PARAMOUNT CONCERN

July 25, 1996

A number of commenters in this proceeding, representing primarily owners of apartment buildings and other such rental property, have contended that implementation of Section 207 of the Telecommunications Act of 1996 (the "Act") would effect an unconstitutional "taking" of their property without just compensation under the Fifth Amendment of the United States Constitution. Evidence in the record now before the Commission clearly refutes this claim and identifies both the legal and factual infirmities in the landlords' position,^{1/} and need not be repeated here. Nevertheless, even if the landlords had a colorable basis for their claim, their asserted interest does not outweigh the countervailing rights their individual tenants possess under the First Amendment as viewers of electronic video programming services.

In Section 207, Congress recognized and validated the rights of such tenants by directing the Commission to adopt rules to "prohibit restrictions that impair a viewer's ability to receive" such programming services.^{2/} Moreover, the legislative history of the provision underscores Congress's intention that such restrictions be equally prohibited whether they are public (*e.g.*, municipal zoning ordinances, etc.) or private in nature.^{3/} In addition to being well grounded in the Congress's findings, this express congressional mandate, which provides the authority (indeed the compulsion) for the Commission to reject the landlord's claims, fully comports with a line of decisions by the Supreme Court of the United States over the course of almost three decades wherein the Court has emphasized the predominant role of viewers' First Amendment rights.

The Court recently stated that, "[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___ U.S. ___, 114 S. Ct. 2445, 2458 (1994) (emphasis added). More than a quarter century ago, the Court first emphasized the role of the individual in effecting the First Amendment's objective of "an uninhibited marketplace of ideas" in the context of broadcast communications, declaring the rights of viewers and listeners to be "paramount." *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S.

^{1/} See, *e.g.*, Further Reply Comments of the Satellite Broadcasting Communications Association of America ("SBCA") (May 6, 1996); Reply Comments of DIRECTV, Inc. (May 6, 1996); Reply Comments of Philips Electronics North America Corp. and Thomson Consumer Electronics, Inc. (May 6, 1996); *Ex Parte* Memorandum filed by SBCA (June 17, 1996).

^{2/} Pub. L. No. 104, 104th Cong., 1st Sess. § 207, 110 Stat. 56, 114 (1996) (emphasis added).

^{3/} See H.R. Rep. 104, Part 1, 104th Cong., 1st Sess. 123-24 (1995). Indeed, the legislative history specifically states that Congress intended Section 207 to "preempt enforcement of" such private property incidents as "restrictive covenants or encumbrances . . . or homeowners' association rules." *Id.*

367, 390 (1969). The Court went on to state that "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Id.* (emphasis added).

In the years following *Red Lion*, the Court has often returned to this principle. Thus, for example, only four years later, in rejecting a claim that broadcasters had a First Amendment and Fairness Doctrine obligation to accept paid editorial advertisements, the Court proceeded from the principle that "the interest of the public is our foremost concern." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973); *see also id.* at 102, 124. The Court determined that finding such a right of access for those who could pay would disserve the interests of viewers by creating a system "heavily weighted in favor of the financially affluent, or those with access to wealth." *Id.* at 123. Instead, the Court, while underscoring the continuing obligation of broadcasters to afford coverage to controversial issues, affirmed the Commission's decision to leave to the broadcaster's discretion the manner in which it would satisfy that obligation.

Next, in 1981, the Court was confronted with a challenge to the FCC's enforcement of Section 312 of the Communications Act which requires broadcasters to afford "reasonable access" to qualified candidates for public office. *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981). In the *CBS, Inc.* case, the network contended that an FCC ruling that the broadcast networks had failed to provide reasonable access to the Carter-Mondale campaign violated the networks' First Amendment rights "by unduly circumscribing their editorial discretion." *Id.* at 394. In support of this argument, CBS relied on the Court's decision in the *Democratic National Committee* case, discussed above. In response, the Court clarified its opinion in that case, by returning to the proposition of *Red Lion*. The Court stated that

Although the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties],' *Columbia Broadcasting System, Inc. v. Democratic National Committee*, [412 U.S.] at 110, the Court has made clear that:

"It is the right of the viewers and listeners, not the right of broadcasters which is paramount. . . ." Red Lion Broadcasting Co. v. F.C.C., [395 U.S.] at 390.

CBS, Inc., 453 U.S. at 395 (emphasis in original). The Court noted that "the First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7) Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *Id.* at 396.

The Court once again highlighted the First Amendment rights of viewers when in 1990, when it affirmed the constitutionality of the Commission's minority ownership policies. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). In finding broadcast diversity to be an important governmental objective, the Court stated that

it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission.

Metro Broadcasting, Inc., 497 U.S. at 567 (1990) (citations omitted).

The paramount importance of viewers' right to access video programming has most recently been reaffirmed by the Court in cases arising under the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). In the first of these cases, *Turner Broadcasting System, Inc. v. Federal Communications Commission*, ___ U.S. ___, 114 S. Ct. 2445 (1994), the Court confronted a First Amendment challenge to the must-carry provisions of the 1992 Cable Act. Although the Court did not reach the ultimate merits of the constitutionality of the must-carry requirements -- owing to the existence of genuine issues of material fact -- it did make a number of important rulings. First, the Court determined that the must-carry rules were content-neutral and, thus, were subject only to intermediate scrutiny in assessing their constitutionality under the First Amendment. In so concluding, the Court stated that "Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable." *Turner Broadcasting System*, 114 S. Ct. at 2461 (emphasis added). The Court specifically held that this objective -- "to ensure that every individual with a television set can obtain access to free television programming" -- was 'not only a permissible governmental justification, but an 'important and substantial federal interest.'" *Id.* (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).^{4/}

Section 207 fulfills a congressional objective very much like that at issue in *Turner Broadcasting*, namely, preserving individual viewers' access to video programming from a wide array of sources. The Commission cannot and must not disregard this "important and substantial federal interest" in deciding how to proceed.

^{4/} Most recently, in another case arising under the 1992 Cable Act, the Court ruled unconstitutional the provision of § 10(b) of the 1992 Cable Act imposing a "segregating and blocking" requirement relative to leased access channel programming citing its "obvious" speech-restrictive effects for viewers." *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, No. 95-124 (and consolidated cases), 64 U.S.L.W. 4706, 1996 U.S. LEXIS 4261 (decided June 28, 1996).